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May 14, 1996

Office of the Secretary
Federal Communication Commission
1919 M Street, N.W.
Washington D.C. 20554

Dear Mr. Caton,

Attached, please find an original of R.K. Production Company's comments on the THE FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, CS Docket No. 96-60 and Document FCC 96-122. In order to file formally, we have enclosed six additional copies of our comments. We have also enclosed five additional copies to be distributed to the individual Commissioners.

Thank you,

Frank Kirkwood
President

Comments by R.K. Production Company on the ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

CS Docket No. 96-60
Document FCC 96-122

May 14, 1996

Introduction

R. K. Production Company today offers comments on the Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking from the point of view of a small programming company which has tried to work under the provisions of the current commercial leased access rules. We are able to describe to the Commission, first hand, the hard lessons learned we have learned and offer our thoughts on the proposed changes.

In the Spring of 1994, we began the process of contacting the seven cable television system operators in the Pittsburgh region for the purpose of gathering the information that we, as a prospective leased access programmer, would need to make decisions about producing a program. Our attempts to secure information were typically met with silence. Multiple letters and phone calls over many months eventually generated some response from the cable operators. By the Spring of 1995, we had been presented with contracts by five of the systems but most of the contracts featured prices and contract stipulations which were clearly out of line with the Commission rules. Two of the companies were so evasive and uncooperative that we felt compelled to file formal complaints with the Commission (CRS-4491-L and 4492-L).

Although we had originally hoped to cablecast on all seven systems in our area, we eventually had to settle on just one, TCI of Pennsylvania, which distributed our television program for six weeks. Our program featured residential real estate for sale directly by the owners. It was a professionally produced program and resembled the programs produced by many real estate companies. The prices charged for distribution on TCI's system were quite steep. But, given the nature of our program (all of the houses featured were, in effect, paid advertisements) we thought we could make it work.

About a week before our first show date, we were informed by TCI of Pennsylvania that our program would not be on the channels agreed to in the lease but on many different channels depending on which area of the system was cablecasting the

program. This switch not only violated the terms of our agreement, but nullified all of the advertising we had done up to that time. Then began a series of "technical" problems. Sometimes the video portion of the program was unwatchable, sometimes the audio portion was distorted. Our program was shown on the wrong channel, it was shown at the wrong time, sometimes it started late, sometimes it was not shown at all.

The effect of this performance on our company was immediate and enormous. The more charitable of our advertisers and potential advertisers thought us to be incompetent. The others thought us to be scammers. After six consecutive weeks of "technical" problems, we determined we could not honor our obligations to our potential advertisers and we decided we could not afford to invest any more of our money or our reputations in the venture. We had to suspend operations.

General Comments on the Order and Further Notice

From this bitter and expensive experience we learned the central fact of leased access programming. Because cable operators are also permitted to be programmers, they are in competition with leased access programmers for channel space and for audience share. They treat leased access programmers as any profit-driven company would treat its competitors. They take every opportunity to avoid, delay, and undermine the efforts of non-affiliated programmers to distribute programming. The system operators own the only thing that non-affiliated programmers cannot do without and cannot purchase elsewhere - that is, the ability to distribute programming.

The Commission's current and proposed rules seem to presume that the system operators are, by and large, honest companies acting in good will. This is not so. The system operators are acting to protect the interests of their stockholders. Part of protecting those interests is maintaining control of the leased access set-aside channels. For the past 12 years (since the 1984 Cable Act), the system operators have done an excellent job doing just that. With the help of the Commission, they have been able keep in place a set of rules that give the appearance of access but the reality of no access. The Commission's proposed rules in the Order and Further Notice fit this pattern well. By consistently interpreting the law to favor the system operators interests and by putting in place rules that permit the system operators to calculate rates in secret in the back rooms of their creative accounting departments, the Commission's proposed rules promise another 12 years of access delayed, another 12 years of access denied.

The proposed "cost" formula, which entrusts the system operators, working behind closed doors, to be the mid-wives for the birth and early development of leased access programming ensures that this hope for free speech on cable television will never come of age. The "cost" formula gives the system operators the opportunity to keep leased access prices high and make desirable time and channel slots very difficult to obtain. In the operators hands, prices for leased access will be calculated in such a way that a leased access programmer will have to match the profitability of some of the system

operators most profitable channels just to be able pay the operator the "lost" profits it has incurred because the leased access programmer has used a leased access set-aside channel. Only after the operator has been paid (for doing and providing nothing), will the programmers be able to pay its bills and, perhaps, make a buck.

We have been unable to identify the reason the Commission has not chosen to use the "market" formula for all leased access time and channel capacity. We believe that the Commission should require the "market" formula be employed for each hour of leased access channel capacity on all leased access channels. Each hour (or half hour) on each set-aside channel should be up for bid. Let competitive bidding among non-affiliated programmers, including the non-profits, set the price.

Since per channel operating costs for the system operators are more than covered by subscriber revenue, the system operators will not loose money under this arrangement (providing that legitimate and regulated administrative fees associated with the leasing process are paid to the system operators by the programmers).

When prices paid by non-affiliated programmers in a competitive environment exceed the cost of administering leased access programming, the excess should be returned to the system subscribers in the form of reduced subscription rates.

Comments on Specific Paragraphs in the Order and Further Notice

Paragraph 10.

"Thus, relying on market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about which leased access programming should be carried by the operator." This makes sense. The "market rate" approach to rate setting will permit programmers like us to compete in the market so long a the competition for channel space is conducted out of the reach of the system operators. But this idea must be expanded for all leased access channels and all hours.

This paragraph mentions that the system operators "could negotiate higher rates". This suggests that criteria other than the willingness of a programmer to pay more than any other programmer for a particular time slot and channel position, could be considered when channel space is purchased. To permit other unspecified criteria to be used by the system operators permits the operators to discriminate on the basis of content and other unknown criteria.

We strongly support a system which will let the marketplace set the rate and we encourage the Commission to adopt the market rate approach to all leased access channels, all the time.

Unfortunately, the Commission's plan to permit the marketplace to set prices only after the operator has met its set-aside requirement ensures that few, if any, systems will reach the "market" plateau. The "cost" portion of the formula provides the operators every opportunity to delay, discourage, and frustrate prospective programmers.

If the Commission believes that the system operators will not take advantage of these opportunities to stick it to the competition, it is ignoring the basic competitive conflict between system operators and non-affiliated programmers as well as ignoring the history of our company and the many other companies who, when faced with the operator's resistance, have given up and walked away.

Paragraph 11.

We agree that when market rates rise above operator's costs to administer the leased access channels, the programmers should be required to pay the going market rate. We encourage the Commission to permit the operators to keep that portion of the programmer's fee that represents legitimate and regulated administrative fees associated with leased access programming and then return any excess funds back to the system's subscribers in the form of reduced subscription rates.

Paragraph 24.

"To the contrary, as long as the maximum leased access rate is reasonable, we believe that minimal use of leased access channels would not indicate that the rate should be lowered." The word "reasonable" in this statement is political word not an economic one. In a competitive market for channel space there can be a market rate. Otherwise, the "reasonable" rate is determined by the reasoner and the reasoning they use. To assert that if leasing does not occur at the "reasonable" rate then problem cannot be the rate but rather the problem must be that the economics of cable television are such that leased access programmers cannot succeed. This is unreasonable reasoning given the fact that leased access programmers are willing to *pay* the operator to distribute programming while affiliated programmers *charge* the operator for programming. As long as the price of access remains a political decision, the reasoning will be in favor of those in power, the cable operators.

Paragraph 25.

"The Commission must therefore seek to promote competition and diversity of programming services on the one hand, as well as to further the growth and development of cable systems on the other."

This statement suggests that these two objectives are contradictory. They are not. Underlying the Commission's reasoning throughout the Order and Further Notice is the blurring of the distinction between the interests of the cable system and the interests of the cable system operator.

The 1984 Cable Act's purpose (Communications Act, 612(a), 47 U.S.C. 532(a)) is to promote diversity "in a manner consistent with growth and development of cable systems". In the Act "the term 'cable system' means a facility..." (47 U.S.C. 522 (5)). "The term 'system operator' means any person or group of persons..."(47 U.S.C. 522 (4)). Clearly, these are different things. The system is the facilities and equipment installed in a community. The system operator is the group of people currently operating the system. Had the Congress wished the law to say "...in a manner consistent with the growth and development of cable system operators" it would have done so.

If the Commission has not made the distinction elsewhere between the interests of the cable system and the interests of the cable system operators (who are the transient operators of those facilities), it needs to address the question. We argue that there is a clear difference that the Commission must recognize.

We argue that giving the subscribing public diversity in programming sources is not contrary , but rather, conductive to the growth and development of individual cable systems. The system operators choose programming based, in large part, on the whether or not the operator or its affiliated company owns all or some portion of the program supplier. While this method of selecting programming may be consistent with the growth and development of cable system *operators* is not consistent with the growth and development of cable systems.

Leased access programming, which sinks or swims based on subscriber response, is far more sensitive to subscriber needs than the top-down programming choices made by cable operators who must serve two masters - the subscriber and the larger corporate structure which includes the affiliated programmers. Leased access programmers serve only the subscriber. Programming that meets the needs of subscribers (or fails to and is replaced by a more successful competitor), is *more* likely to promote the growth and development of a cable system because it gives subscribers what they want.

Paragraph 26.

"Therefore, the Commission is faced with balancing the needs of programmers with the needs of cable operators." We believe that this misstates the question. The Law says "...will not adversely affect the operation, financial condition, or market development

of the cable system.". The law does not say "will not adversely affect the operation, financial condition, or market development of the cable system operator". There is a difference.

A true free market in programming promotes the operation, financial condition, and market development of cable systems just as a free market promotes competition and improvement in every area of the economy. With a free market (even if confined to only a few leased access channels), the subscriber will get a better product and at a better price (as long as the Commission endorses the idea of using excess fees collected from leased access programmers to reduce subscriber rates). This sort of arrangement will make cable systems less expensive, more diverse, and of higher quality. Permitting system operators to select programming from affiliated programmers then passing the artificially inflated cost on to the subscriber makes the cable system more expensive, less diverse, and, as far as quality, just turn on the television and check for yourselves.

Paragraph 28.

"We believe that, if the maximum rate for leased access is reasonable, the resulting demand for leased access channels will also be reasonable." This sentence may sound "reasonable" on M Street (and perhaps to the ears of former Eastern European economic planners), but all it really means in the proposed "cost" system is that the system operators will maintain rates at their current "reasonable" level (very high) and the resulting demand for leased access channels will remain "reasonable" (that is, almost non-existent). Very reasonable, indeed!

The Commission should take a lesson from the failed economic planners - you cannot produce a market without market forces. You cannot create price and demand with a calculator and a set of complicated rules. The Congress has set the supply - 10 to 15% of capacity. Now the Commission should get out of the equation, keep the operators out of the equation and let a free market develop.

Paragraph 40.

Our company has had the experience of waiting months and, in some cases, almost two years for the information that the Commission now is requiring system operators to supply in seven business days. This is very good news for all prospective leased access programmers.

We are, however, concerned that some system operators may still opt to ignore information requests from prospective programmers, knowing that many prospective programmers will never file a complaint. Once a leased access programmer approaches a system operator about access and the system operator shows a lack of enthusiasm for leased access programming, few business people are willing to begin a relationship with

the operator (their only possible provider of distribution) by filing a formal complaint with the Federal government. For, even if the programmer prevails with the Commission, the programmer must then place their hopes, dreams, and fortunes (in the form of a 3/4 inch video cassette) in the hands of the same company that it has publicly accused of law breaking.

Those programmers who do file a complaint can expect to wait a year or more for a ruling from the Commission. Very few programmers are in the position to write a complaint themselves or pay to have one written and then to wait a year in order to be able to take the first step in putting a program on cable television. Unless the Commission is willing to rule on this sort of complaint immediately or issue (in the very near future) severe penalties to past violators, we suspect many system operators will take the easy path and continue to ignore requests from prospective programmers.

Paragraph 61.

As one walks around the hallway or sits in the waiting rooms of the Commissioners' offices at 1919 M Street one can't help but notice so many good looking people in good looking suits coming and going. It's all first names and inside jokes with the Commissioners' staffs and even a small gift for the office, since its the holiday season. They know who to talk to within the Commission and what to talk to them about. They know how to get in to see the Commissioner. They are glad to explain their client's position to anyone who would like to hear it. They will explain it over and over. They are relentless. It's their job.

But even given this environment, it is still stunning to see the sentence "We generally agree with Time Warner that the value of leased access channels 'is the opportunity cost imposed on the operator from the lost chance to program these channels.'"

First, plainly and surely, if Congress had intended for the system operator's to be compensated for these so called "opportunity costs" it would have expressed that notion plainly and clearly in the law and it did not!

Second, the provision in the law that establishes leased access is itself an opportunity cost put on the cable operators. In exchange for the opportunity to have exclusive control of 85-90% of channels, they are required to set aside 10-15% of channel capacity for use by the several hundred million other individuals and businesses in the United States. Given the monopoly position that the system operators enjoy in almost every community in this country, and their enjoyment of the use of both public and private properties to run their cables, it is difficult to understand how the system operators convinced the Commission that the rest of country owes them something for daring to get in the way of their having control of 100% of all channels, all the time.

The rest of the country does not owe Time Warner a living. If they cannot make enough money using 85-90% of existing capacity, then they should build more capacity. There is no provision in law or reason that requires leased access programmers to pay system operators for doing nothing. The only possible reason for such a provision is drive up the costs to non-affiliated programmers, in order to make it impossible for us to succeed.

It is not difficult to see why the system operators think this is a good idea. It is more difficult to understand how the Commission, though constantly being romanced by the richly resourceful lobbyists, has been seduced into believing and then professing, that permitting such "opportunity" costs advances the purpose of the law.

Paragraph 70.

"On the other hand, we tentatively conclude that if the operator satisfies its set-aside requirement, the maximum rate should be a market rate determined by negotiation between the operator and the leased access programmer."

Unless there were some reason that a system operator would believe it to be in its best interest to satisfy its set-aside requirement and enter the "market" part of the scheme, it is likely that few ever will. Years may pass before the Commission even makes clear what is required to satisfy the set-aside requirement. If the least desirable time slots and channel positions are not completely filled, will the requirement not yet be satisfied? Or will it be enough that if all leased access channels in the 8-9 p.m.slot are filled, then the requirement will be satisfied for those times? Regardless of the specific rules the Commission may finally settle on, the system operator who does not wish to cross this threshold into the "market" phase, will not. As the threshold approaches, costs (as calculated by the operator) will rise and technical difficulties will mysteriously afflict programming. Some number of programmers will be culled from the field and the threshold will recede into the distance.

"Thus, relying of market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about which leased access programming should be carried by the operator." We agree and believe that this principal should be applied at all times for all leased access channels regardless of whether or not the system has met the allusive "set-aside requirement".

Paragraph 73.

We believe that market rates should prevail for all leased access channels all the time. We agree that rates should be allowed to rise above the imaginary maximum reasonable rate. Fees paid in excess of the operator's costs should be used to reduce fees to subscribers.

If the "cost" scheme were to produce a robust leased access programming demand which exceeded the set-aside requirement (and there is NO chance of that happening), or if the Commission were to take our suggestion of using a market scheme for all leased access channels, all the time, the operators must be required to accept the highest bidder. To do otherwise is to give system operators editorial control over leased access programming.

One can imagine the problems that a programmer such as R.K. Production Company encounters when attempting to distribute programming featuring residential real estate for sale. Many system operators produce the same type of program. The value to them of keeping our program off the cable far outweighs whatever dollars they may lose by choosing the second highest bidder.

Paragraph 80

If leased access programmers are required to pay "lost advertising revenues" they will be put in a position of not only having to sell enough advertising to make a profit for themselves but also enough to pay the system operator for doing nothing. This is a welfare program for the cable companies. The Commission is obligated to protect the cable system not the cable system operators.

Paragraph 85.

The categories of "Net Opportunity Costs" are all without basis in law or reason. Leased access programmers should not be required to pay the system operators for obeying the law.

Additionally, these various costs (calculated in secret by the system operators) require the operators to make dozens of judgment calls when determining their "losses". If the system operators wanted to encourage leased access programming, none of these machinations would be necessary. But, since they do not want leased access programmers, the Commission can be sure that all such judgment decisions made by the operators will be made in favor of raising the real and imagined losses.

We urge the Commission to take the system operators out of the equation. Open up all hours, on all leased access channels to competitive bidding. Let the subscriber fees cover the system operator's operating costs. Let the operators charge a (regulated) fee for administering contracts. If leased access programmers are initially unwilling to participate in great numbers, then surely the non-profits will. This is a win-win-win-win solution. Non-affiliated programmers get access without having to fight though the endless obstacles erected by the system operators, non-profits get affordable cable time,

subscribers get diversity and competition, the cable system carries programming which meets the needs of subscribers, and system operators meet their set-aside requirements.

Paragraph 92.

One of the many ways the system operators will use the proposed "averaging" arrangement to repel leased access producers will be by selectively choosing the channels to be included in the average. If a system were required to set-aside 8 channels, the system operator would select 7 of the most profitable channels for inclusion in the averaging formula. In addition, an 8th channel, with low or no profitability to the operator would be designated as the first leased access channel to be offered to leased access programmers. Thus, they would require leased access programmers to pay the highest prices for the least valuable channel.

Because the prices would be so high, it would be unlikely that many leased access programmers would be willing to pay for access. Those who do will be put on the 8th channel. If the T.V. 24 Sarasota, Inc. vs. Comcast precedent is allowed to stand, the operator will be able to place all leased access requests on this one channel. This way highly profitable channels can be listed as set-aside channels for purposes of raising the cost to leased access programmers without actually being in jeopardy of being used by leased access programmers. In the unlikely event that the operator could not prevent this 8th channel from filling up, it would have the opportunity to re-designate its set-aside channels and avoid having leased access programming on a profitable channel.

Or if they really wanted to boost the lost "opportunity costs" the 8th (or any other channels in the group used for averaging) could be sold to the operator as part of a sweetheart deal with an affiliated programmer. Perhaps this 8th channel would be sold to the system operator by an affiliated programmer as part of a package. The package would include the 8th channel as a "free" channel. The operator would be paying nothing for the programming on the 8th channel and all of advertising revenue from this channel would be profit that the leased access programmer will have to replace as "lost advertising revenues".

The Commission can be sure that the system operator's managers, lobbyists, and attorneys have thought of many other ways to manipulate these numbers to produce high prices for leased access programmers. The Commission's proposal to let the operators do these calculations in private and then require that a certified public accountant review the calculations before the Commission will even entertain a challenge by from a Leased Access Programmer guarantees at least 12 more years of access denied. Expand the market formula for all leased access channels for all hours.

Paragraph 99.

The Order and Further Notice so well states the obvious faults and deleterious effects of the highest implicit fee formula (in Paragraphs 6, 7, and 8), that it hardly seems necessary to present the argument that this system should not be continued to the brink of the next millennium, as is contemplated in Appendix E. Whoever in the Cable Services Bureau suggested that this might be a reasonable course of action has been spending way too much time in the company of the system operators.

All system operators have known for 12 years that they are obligated to set aside leased access channels. All system operators know that the rules have been under reconsideration for the last several years. None of the proposed changes will cause the total number of set-aside channels to be increased beyond the previous set aside requirement. The obligation of the system operators has not changed and so no allowance is necessary.

Even if the changed rules do increase the likelihood that more leased access programmers will enter the market (and the cost formula will not), it is non-sensical to permit operators to employ a discredited formula solely for the purpose of maintaining unjustifiably high prices in order to discourage all leased access programmers, on all systems, from gaining access.

As for the other perceived problem, "sudden disruption to subscriber's programming line-ups", we feel that the nation's emergency medical and psychological trauma treatment facilities are up to handling any crisis arising from increased leased access usage. Perhaps the system operators, out of genuine concern for their subscribers, would be willing to help avoid wide-spread disruption in the future by treating some leased access programmers with respect and dignity and put them on the cable now, even before any new rules take effect.

Paragraph 115.

By opening all hours of all leased access channels to competitive bidding, and by allowing system operators to charge only the costs of administering the necessary contracts, the resulting cost of time on a leased access channels should permit most non-profits to be able to afford to present their programs.

Paragraph 124.

Just as lawyer can argue any side of an issue depending on who he or she works for, so the Cable Services Bureau can rule on any side of an issue depending on who has the power. So it is here.

The Cable Act sets aside some number of channels on each qualifying system for use by leased access programmers and permits operators to use any of those channels as it wishes when the channel is not being used by a leased access programmers. With the ruling in the TV-24 Sarasota, Inc. vs. Comcast case, the Cable Services Bureau has turned the law on its head. Now, leased access producers can only use more than one set-aside channels only if the operator does not claim that there is "substantially greater harm" to subscribers, the operator, or non-leased access programmers. With that turn-about, leased access programmers who wish to have a program distributed at, say, 8 p.m. have had the channels available for programming reduced from 5 or 10 to just 1. If another programmer is already on that one channel at 8 p.m., the leased access programmers will be offered a "comparable" time slot. Thus, the law as been amended by the Cable Services Bureau to change the set-aside channel capacity from 10% or 15% to 1% or 2%.

The Commission must stop now and turn around. To continue down this errant road is to involve leased access programmers, system operators and the Commission itself in long protracted discussions of the imponderable. In television, as in Nature, there are no "comparable" time periods. A programmer's selection of time slots takes into consideration the other programming on the air at that specific time, the day of the week, the hour of the day, the specific audience targeted, and other individual local market considerations. It is to be expected that most programmers (leased access and others) will want to distribute their programming during the hours when the most potential viewers are watching. Naturally, in a robust leased access programming environment, many programmers will want to program during the same time slot. The ability to distribute programming at the time the programmer believes is best is essential to the success of leased access programmers

Is Tuesday at 8:30 "comparable" to Saturday at 7:00? Is Noon on Sunday "comparable" to Noon on Thursday? Who is to say? Would the Commission propose a local analysis of the viewing audience and then assign a correlation coefficient value by which "comparability" should be demonstrated? This is foolishness.

In a "market" environment, the issue of who gets the most desirable time slots should be worked out in the bidding process for all set-aside channels, not left to the operators to give or take away.

Even in the TV-24 case, the harm involved seems to be little more than inconvenience to the operator. It is not necessary to knock a full-time channel off a system to accommodate part-time leased access programming. The non-leased access programmer who is programming on a leased access set-aside channel must understand that, from time to time, its programming may be pre-empted for the playing of a leased access program.

Our experience was that our leased access program pre-empted a programmer using the leased access set-aside channel. When our one-hour program concluded, the pre-empted programmer resumed use of the channel. This "possible disruption of existing

programming" comes with the territory when a non-leased access programmer chooses to program on a leased access set-aside channel. If the non-leased access programmer is uncomfortable with that arrangement, they should either negotiate with the operator for a non-leased access set-aside channel or become a leased access programmer itself.

The possible pre-emption of programming should seem a small inconvenience to the non-leased programmer given that, under current rules, a leased access programmer could request and receive (at least, theoretically) the entire channel. It makes no sense for the Commission to bar small periods of pre-emption of existing programming but still permit that the existing programming can be done away with completely if a leased access programmer requests 8, 12. or even 24 hours of the set-aside channel.

The Commission must depart from this precedent and rule that the set-aside channels are just that. They are set aside for the use of leased access programmers. Others who use them must understand that they risk the possibility of pre-emption. To permit the cable operators to make decisions about what is a "reasonable accommodation" or a "comparable time period" or for the Commission to further involve itself in this debate, subverts the law, guarantees endless delays and will further stifle leased access programming.

Paragraph 125.

Here the Commission tentatively concludes that it is more important for the system operators be able to continuously cablecast snow and static than it is for a leased access programmer to be able to cablecast its program at the time it thinks is best for the survival of its business. R.K. Production Company tentatively concludes that the Federal Communications Commissioners themselves need to look within the Cable Services Bureau to see how such a conclusion could be offered, before the integrity of the Commission itself is brought into question.

Paragraphs 137, 138, and 139.

The proposed method to "streamline" the rate complaint process before the Commission is well designed for success. If employed, the Commission may never again face a rate complaint. There may literally be no leased access programmers in the country with enough time or money to participate in the proposed complaint process.

For example, let's suppose that a company like R.K. Production Company were to attempt to place its real estate program on the seven cable systems in a metropolitan area under this proposed process. The leased access programmer will request prices and channel availability information form the system operators. Many, if not all, of the system operators (understanding the Commission's rules and recognizing this leased access programmer as a programming competitor) will set prices high enough to make it

impossible for the programmer to succeed. At this point the programmer cannot file a complaint with the Commission but must first begin the process of an review of the operator's calculation by an independent certified public accountant.

None of the seven operators wish to use the CPA suggested by the programmer but instead choose accountants of their liking. Two months after the request for a review, the review takes place. Now, the operator and the operator's accountant sit together behind closed doors. The operator "provides the accountant with all information necessary to support its rate calculation, including an explanation of how the rate was calculated". No one is there to provide the information that does not support the rate calculation or to challenge the underlying assumptions and self-serving calculations that the system operator has used to come up with the figures that are now presented to the accountant.

It would not be unreasonable to expect an accountant to spend, at least, two working days studying the Commission's rules, visiting the operator's office, and writing a final report. An accountant chosen by the system operator could charge $200 per hour and still be well within the industry norm. That figures out to $1,400 per system or $9,800 for all seven systems. No matter what portion of that figure might be paid by the leased access programmer, it is too much. The game is fixed against the programmer.

But, lets say the programmer is clueless enough to participate in this plan. Lets even say that four of the systems are found to be charging "reasonable" rates and three are found to be charging "unreasonable" rates. The programmer's only recourse in the case where the rates are found to be "reasonable" is to file a complaint with the Commission. (The suggestion that alternative dispute resolution could be used is incorrect because the "facts" of the case are only those "facts" the operators choose to show).

Already almost three months have passed. Now the question is in the deliberative hands of the Cable Services Bureau. Now a year has passed and the Bureau Chief issues a decision. But, alas, it does not matter what has been decided, the programmer is out of business. The time and expense of waiting and paying for a "reasonable" rate were too much.

In the cases where the operator has been found to have offered an "unreasonable" rate the road ahead for the programmer is even worse. Presumably, the operator would then be required to present new rates. If the rates are high again, the programmer will request another review and the operator will hire another accountant (and you can be sure it will be a more "reasonable" one). Now four or five months have passed. Now the accountant finds the new rates to be "reasonable" and the programmer challenges the rates before the Commission. Sometime later the Commission, finds the rates to have been calculated based on faulty assumptions, but it won't matter because it will then be time for the operator to engage in the annual re-calculation of the rates. It is endless.

The more complicated, slow, and expensive the Commission makes the process, the less likely it is that any leased access programmers will be able to participate. One cannot help thinking that this is, in fact, the intent of such rules.

Paragraph 140.

Everyday that the Cable Services Bureau fails to issue a decision in a complaint brought by a leased access programmer is a victory for the system operators. Currently the operators can count on hundreds of consecutive days of victory in any dispute no matter the merits of the programmer's complaint. If the delay is long enough, the programmer will no longer have a viable business on the day the decision is finally made. Access delayed is access denied. The Cable Services Bureau is an agent of delay, an agent of denial.

The Commission should institute an market system of competitive bidding for all leased access channels at all times. This would permit the Commission to get out of the business of ruling on the minutia of each aspect of the complicated formulas proposed in the Order and Further Notice. The Commission can be sure that the system operators will fight to retain control over every minute of every set-aside channel and that the Commission will be in the middle of every fight. This is a perfectly acceptable arrangement for the system operators but will require endless work and expense for the Commission and, ultimately, will provide no access for anyone but the system operators.